

Pacific Fantasy Vacation Sdn Bhd v Heritage Grand Vacation Club Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S22-867 OF
2005
AZIZUL AZMI ADNAN JC
27 AUGUST 2015

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Civil Procedure — Pleadings — Defects in pleadings — Plaintiff filed action to claim outstanding commissions — Statement of claim at variance with evidence adduced — Defendant raised no objection on evidence adduced — Whether defects in statement of claim cured

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Contract — Agreement — Binding agreements — Plaintiff entered into agency agreement with defendant for commissions of sales of timeshare memberships — Defendant asked plaintiff to sign new agreement for lesser commissions — Whether defendant bound by terms of agency agreement — Termination — Whether defendant repudiated or unlawfully terminated agency agreement — Limitation — Whether plaintiff's action barred by limitation — Laches — Inordinate delay in bringing claim — Whether plaintiff's action barred by doctrine of laches

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The defendant operated a timeshare membership scheme which the plaintiff had sold to the public and claimed to have done so as an agent of the defendant. The plaintiff claimed to have entered into an agreement ('the agency agreement') with the defendant for payment of commissions of sale of the timeshare memberships, however, the agreement was actually signed solely by one Datin Ooi Chid Lee ('PW1') prior to the incorporation of the plaintiff. On 11 September 2001, the defendant asked the representatives of the plaintiff to sign an agreement providing for a lower rate of commission but the plaintiff refused to do so. Subsequently, on 12 September 2001, the defendant removed its staffs together with all its items from the plaintiff's premises which were previously stationed at the premises for them to facilitate the sale of the timeshare memberships. The present action was filed by the plaintiff in July 2005 to claim the outstanding commissions that were due to it in connection with the sales of memberships in 1999, 2000 and 2001. The issues for determination were: (a) whether the plaintiff's claim must necessarily fail on point of pleading on the basis that the agency agreement was stated in the statement of claim to have been entered into prior to the date of incorporation of the plaintiff; (b) whether O 34 of the Rules of Court 2012 ('the ROC') operated to bind the parties to the list of issues to be tried that had been filed into court; (c) whether the defendant bound by the terms of the agency

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- A agreement; (d) whether the defendant had repudiated or unlawfully terminated the agency agreement; (e) whether the plaintiff was entitled to the commissions amounting to RM2,389,164.42; (f) whether the plaintiff's action was barred both by limitation and the doctrine of laches; and (g) whether the plaintiff was bound by the consent judgment entered by the defendant and HGVC Marketing.
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Held, allowing the claim:

- C (1) No objection was raised by the defendant when the plaintiff sought to introduce evidence that was at variance with its statement of claim. The evidence that was sought to be adduced did not constitute such a radical departure from the plaintiff's original claim as would justify dismissal of the plaintiff's action. The defect in the plaintiff's pleadings was therefore cured, on the basis that it could not be said that the defendant in this case was taken by surprise by the evidence of PW1 that the plaintiff was only incorporated after the execution by PW1 of the agency agreement, not least because the date of incorporation of any company would be a matter of public record (see para 19).
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- E (2) There is nothing in plain words of O 34 of the ROC that has the effect of binding the parties to the list of issues to be tried that has been filed into court. The advent of the list of issues for trial was not intended to supplant the rules of pleadings. Order 34 of the ROC simply provides for the power of court to order or direct parties so that cases may be conducted in a just, expeditious and economical manner (see para 25).
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- G (3) Based on the evidence, there was in existence an agreement between the plaintiff and the defendant based on or based substantially on the terms of the agency agreement. The fact that the defendant had tried in September 2001 to get the plaintiff to agree to new terms for the payment of reduced commission showed that the defendant had regarded itself bound by the terms of the agency agreement (see para 35).
- H (4) The removal of the sales documentation, credit card machines, computers, vouchers and receipt books was a clear indication that the defendant did not intend to carry on with its obligations under the agency agreement, and therefore amounted to a repudiation of the same. The consequence of such termination was that the plaintiff was discharged from its obligations under the agency agreement. However, the fact of termination did not discharge the defendant from its obligations (see paras 37 & 40).
- I (5) Pursuant to s 106 of the Evidence Act 1950, where a fact is especially within the knowledge of a party, that party bears the burden to prove that fact. The defendant did not tender evidence to show the actual rate of default or termination in respect of the memberships. In the present

circumstances, the plaintiff has proven its claim, which, based on the testimony of PW2, was derived from the actual membership sales. However, the plaintiff ought not to be entitled to claim commissions in respect of sales in the year 1999 which was prior to the incorporation of the plaintiff (see paras 52–53).

- (6) The plaintiff's cause of action arose when the defendant repudiated the agency agreement and failed to pay the commissions when they became due and payable, beginning from September 2001. This action was commenced on 25 July 2005, which meant that the plaintiff was not out of time. As for the doctrine of laches, for the doctrine to apply, the plaintiff must have been guilty of unconscionable delay in prosecuting its claim. However, in the present case, there was no cogent evidence tendered by the defendant to show the same (see paras 56 & 58).
- (7) A consent judgment operates as an agreement between the parties to the action. As the plaintiff was not a party to the consent judgment between the defendant and HGVC Marketing, the plaintiff was not bound by it (see para 61).

[Bahasa Malaysia summary]

Defendan menjalankan operasi skim keahlian perkongsian masa yang telah dijual oleh plaintif kepada orang awam dan mendakwa telah melakukan sedemikian sebagai ejen defendan. Plaintif mendakwa telah memasuki perjanjian ('perjanjian agensi') dengan defendan untuk bayaran komisen jualan keahlian perkongsian masa itu, walau bagaimanapun, perjanjian itu sebenarnya telah ditandatangani oleh Datin Ooi Chid Lee ('PW1') seorang sebelum pemerbadanan plaintif. Pada 11 September 2001, defendan meminta wakil plaintif menandatangani perjanjian yang memperuntukkan komisen dengan kadar lebih rendah tetapi plaintif enggan berbuat demikian. Berikutan itu, pada 12 September 2001, defendan telah membuang kakitangannya bersama semua barangnya dari premis plaintif yang sebelum ini ditempatkan di premis itu untuk mereka bagi memudahkan jualan keahlian perkongsian masa itu. Tindakan ini telah difailkan oleh plaintif pada Julai 2005 untuk menuntut komisen tertunggak yang kena dibayar kepadanya berkaitan jualan keahlian itu pada tahun 1999, 2000 dan 2001. Isu-isu untuk ditentukan adalah: (a) sama ada tuntutan plaintif perlu gagal apabila membuat pli berasaskan bahawa perjanjian agensi itu dinyatakan dalam pernyataan tuntutan telah dimasuki sebelum tarikh pemerbadanan plaintif; (b) sama ada A 34 Kaedah-Kaedah Mahkamah 2012 ('KM') beroperasi untuk mengikat pihak-pihak kepada senarai isu-isu yang perlu dibicarakan yang telah difailkan ke mahkamah; (c) sama ada defendan terikat dengan terma perjanjian agensi itu; (d) sama ada defendan menyangkal atau menamatkan secara tidak sah perjanjian agensi itu; (e) sama ada plaintif berhak kepada komisen berjumlah RM2,389,164.42; (f) sama ada tindakan plaintif dihalang oleh had masa dan doktrin laches; dan (g) sama ada plaintif terikat dengan penghakiman

A persetujuan yang dimasuki oleh defendan dan HGVC Marketing.

Diputuskan, membenarkan tuntutan:

- B (1) Tiada bantahan telah ditimbulkan oleh defendan apabila plaintif memohon untuk memperkenalkan keterangan yang bercanggah dengan pernyataan tuntutan. Keterangan yang dipohon untuk dikemukakan tidak merupakan suatu yang amat berbeza dengan tuntutan asal plaintif kerana ia mewajarkan penolakan tindakan plaintif. Kecacatan pliding plaintif oleh itu dipulihkan berasaskan ia tidak boleh dikatakan bahawa defendan dalam kes ini telah terkejut dengan keterangan PW1 bahawa plaintif hanya diperbadankan selepas pelaksanaan perjanjian agensi oleh PW1, sekurang-kurangnya kerana tarikh pemerbadanan mana-mana syarikat akan menjadi perkara rekod awam (lihat perenggan 19).
- D (2) Tiada apa-apa yang nyata dalam peruntukan A 34 KM yang mempunyai kesan mengikat ke atas pihak-pihak kepada senarai isu-isu untuk dibicarakan yang telah difailkan ke mahkamah. Adanya senarai isu-isu untuk perbicaraan tidak bertujuan untuk menggantikan kaedah-kaedah pliding. Aturan 34 KM hanya memperuntukkan kuasa mahkamah memerintah atau mengarahkan pihak-pihak agar kes itu boleh dijalankan dalam cara yang adil, cepat dan menjimatkan (lihat perenggan 25).
- E (3) Berdasarkan keterangan, terdapat perjanjian antara plaintif dan defendan berdasarkan atau secara substantial berdasarkan terma-terma perjanjian agensi itu. Fakta bahawa defendan telah mencuba pada September 2001 untuk mendapatkan plaintif bersetuju dengan terma-terma baru bagi bayaran komisyen yang dikurangkan menunjukkan bahawa defendan telah menganggap dirinya terikat dengan terma-terma perjanjian agensi itu (lihat perenggan 35).
- F (4) Penyingkiran dokumentasi jualan, mesin kad kredit, computer, baucer dan buku resit jelas menunjukkan bahawa defendan tidak berniat untuk meneruskan obligasinya di bawah perjanjian agensi itu, dan oleh itu meruakan pembatalan yang sama. Akibat penamatan tersebut adalah plaintif telah dilepaskan daripada obligasinya di bawah perjanjian agensi itu. Walau bagaimanapun, fakta penamatan itu tidak melepaskan defendan daripada obligasinya (lihat perenggan 37 & 40).
- G (5) Menurut s 106 Akta Keterangan 1950, di man suatu fakta terutamanya adalah dalam pengetahuan satu pihak, pihak itu mempunyai beban untuk membuktikan fakta tersebut. Defendan tidak menenderkan keterangan untuk menunjukkan kadar sebenar kegagalan atau penamatan berkenaan keahlian itu. Dalam keadaan ini, plaintif telah membuktikan tuntutan, yang mana, adalah berdasarkan keterangan PW2, yang diperoleh daripada jualan keahlian sebenar. Walau
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bagaimanapun, plaintif tidak patut berhak menuntut komisen berkenaan jualan dalam tahun 1999 iaitu sebelum pemerbadanan plaintif (lihat perenggan 52–53).

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- (6) Kausa tindakan plaintif timbul apabila defendan menyangkal perjanjian agensi itu dan gagal membayar komisen apabila ia perlu dibayar dan kena dibayar, bermula dari September 2001. Tindakan ini bermula pada 25 Julai 2005, yang bermaksud plaintif tidak di luar masa. Berhubung doktrin laches, untuk doktrin itu terpakai, plaintif perlu didapati bersalah kerana kelewatan yang tidak berpatutan dalam dakwaan tuntutan. Walau bagaimanapun, dalam kes ini, tiada keterangan yang meyakinkan telah ditenderkan oleh defendan untuk menunjukkan sedemikian (lihat perenggan 56 & 58).

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- (7) Suatu penghakiman persetujuan beroperasi sebagai perjanjian antara pihak-pihak kepada tindakan. Oleh kerana plaintif bukan pihak kepada penghakiman persetujuan antara defendan dan HGVC Marketing, plaintif tidak terikat dengannya (lihat perenggan 61).]

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Notes

For cases on binding agreements, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3275–3277.

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For cases on defects in pleadings, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 6937–6946.

Cases referred to

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Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994]

2 MLJ 754; [1994] 3 CLJ 133, SC (refd)

Moschi v Lep Air Services Ltd [1973] AC 331, HL (refd)

Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291, SC (refd)

Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)

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Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (dstd)

Legislation referred to

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Civil Law Act 1956 s 11

Companies Act 1965 Division 5, Part IV

Evidence Act 1950 s 106

Rules of Court 2012 O 34, O 34 rr 2, 2(2), 2(3)

Manokaran (N Yohendra and Lavinia Lim with him) (Netto & Yohendra) for the plaintiff.

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Gan Techiong (Gan & Lim) for the defendant.

A Azizul Azmi Adnan JC:

INTRODUCTION

B [1] This was an action in contract, by which the plaintiff claimed to be entitled to outstanding commissions in respect of the sale of timeshare memberships regulated under Division 5 of Part IV of the Companies Act 1965.

C *Brief background*

D [2] The defendant, Heritage Grand Vacation Club Bhd operated a timeshare membership scheme. Under such a scheme, memberships may be offered to the public subject to certain regulation imposed under the Companies Act 1965 and by guidelines issued by the Companies Commission of Malaysia.

E [3] The plaintiff, Pacific Fantasy Vacation Sdn Bhd, sold these memberships to the public. The plaintiff claimed to have done so as agent of the defendant. The defendant however claimed that it had appointed a third party as an exclusive sales and marketing agent, and that the plaintiff's recourse ought to be against this third party.

F [4] The plaintiff initially pleaded that it had entered into an agreement ('the agency agreement') with the defendant in or about February 1999 for the payment of commissions in connection with the sale by the plaintiff of timeshare memberships of the defendant. However, based on the evidence received at trial, it became apparent that:

- G** (a) the defendant had not countersigned the agency agreement;
- (b) Datin Ooi Chid Lee ('PW1'), who had signed the agency agreement in February 1999, had done so in her personal capacity, for the sole proprietorship under which she was then carrying on business; and
- H** (c) the plaintiff was only incorporated on 24 December 1999, after the agency agreement was executed by PW1.

I [5] In September 2001, the defendant invited representatives of the plaintiff to attend a meeting held in the defendant's premises on 11 September 2001. At this meeting, the representatives of the plaintiff were asked to sign an agreement providing for a lower rate of commission — 20% rather than 25% — failing which the existing agreement would expire at the end of September 2001.

[6] Based on the testimony of PW1, she was asked to sign the agreement on the spot, and was not given the opportunity to take a copy of the new agreement to study its terms. No agreement was arrived at between the parties at this 11 September 2001 meeting.

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[7] The following day, the defendant's administrative staff removed all sales documents, the credit card machine, the defendant's staff computer, vouchers and receipt books from the premises of the plaintiff. Up until that time, the defendant had stationed its staff in the premises of the plaintiff in order to facilitate the sale of the timeshare memberships.

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[8] It is notable that PW1 was not cross-examined on her account of the events of 11 and 12 September 2001. Nor did any of the witnesses of the defendant provide any evidence to the contrary.

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[9] The plaintiff claimed for outstanding commissions that it alleged were due to it in connection with sales of memberships effected in 1999, 2000 and 2001. It is important to note that the outstanding commissions were payable *after* 12 September 2001, and that the plaintiff's claim in this action does not involve commissions that were payable before such date, which the plaintiff acknowledged had been duly paid to it.

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Issues

[10] The issues that arise in this case are as follows:

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- (a) whether the plaintiff's claim must necessarily fail on a point of pleading, on the basis that the purported agreement was stated in the statement of claim to have been entered into prior to the date of incorporation of the plaintiff;
- (b) whether O 34 of the Rules of Court 2012 operated to bind the parties to the specific issues delineated in the list of issues for trial agreed between the parties in the pre-trial case management conferences before the court. As the plaintiff had not yet been incorporated on the date specified in the first issue in the list of issues for trial, the defendant argued that this court must find that there was no contractual relationship between the parties at the material time and must accordingly dismiss the plaintiff's claim;
- (c) whether there was any contractual relationship between the plaintiff and the defendant governing the payment of commissions on the sale by the plaintiff of timeshare memberships of the defendant, and in particular whether the defendant was bound to the plaintiff by the terms of the agency agreement;

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- A (d) whether the defendant had repudiated or unlawfully terminated the agency agreement;
- (e) whether the plaintiff was entitled to claim from the defendant outstanding commissions in the amount of RM2,389,164.42 as a consequence of such repudiation or termination;
- B (f) whether the plaintiff's claim was barred both by limitation and by the application of the doctrine of laches; and
- (g) the defendant had pleaded that, by virtue of the consent judgment entered into between (among others) the defendant and HGVC Marketing Sdn Bhd ('HGVC Marketing'), a company controlled by one of its former directors, Chua Kim Hwa, who was also a witness subpoenaed by the defence in this case, the defendant had settled all outstanding commissions payable in connection with the sales of the timeshare memberships. Accordingly, the defendant argued that the plaintiff's recourse ought to be against HGVC Marketing, and that the terms of the consent judgment would operate to prevent the plaintiff from making any claim against the defendant.
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E FINDINGS AND DECISION

[11] The following summarises the findings of this court:

- (a) the defect in the plaintiff's pleadings is cured because:
- F (i) no objection was raised by the defendant when the plaintiff sought to introduce evidence regarding the date of incorporation of the plaintiff that was at variance with its statement of claim; and
- (ii) the evidence that was sought to be adduced did not constitute such a radical departure from the plaintiff's original claim as would justify dismissal of the plaintiff's action,
- G on the authority of *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185;
- H (b) O 34 r 2 of the Rules of Court 2012 does not have the effect of binding the parties to the list of issues to be tried that has been filed into court in the course of pre-trial case management conferences, and the advent of O 34 r 2 providing for the power of court to direct parties to, inter alia, file a list of the issues to be tried does not supplant the rules of pleadings;
- I (c) having regard to the conduct of the parties, the relevant correspondence, memoranda and other documents tendered in evidence and the surrounding circumstances of the case, there was in existence an agreement between the plaintiff and the defendant based on or based substantially on the terms of the agency agreement;

- (d) the agreement between the plaintiff and the defendant could not have preceded the incorporation of the plaintiff on 24 December 1999, and as a consequence, the plaintiff's claim for commissions payable in respect of sales effected in 1999 must necessarily fail; A
- (e) the defendant had, by its conduct, repudiated the agency agreement, entitling the plaintiff to regard the agency agreement as having been terminated and discharged. The fact of termination does not discharge the defendant from its obligations and the defendant remains liable to the plaintiff for the commissions payable in respect of sales effected by the plaintiff prior to termination; B
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- (f) the plaintiff has proven its claim for the outstanding commissions, the figures for which were derived from the actual membership sales. However, as the plaintiff may not claim for commissions in respect of sales effected in the year 1999, the plaintiff is only entitled to the amount of RM2,209,555 in outstanding commissions; D
- (g) the plaintiff's claim is not barred by limitation, as the plaintiff's claim is only in respect of commissions that ought to have been payable from September 2001 onwards. This action was commenced in July 2005, well within the period of limitation; E
- (h) on the facts, the plaintiff was not guilty of unconscionable delay in prosecuting its claim as would preclude it, by the application of the doctrine of laches, from claiming the relief sought; and
- (i) the consent judgment entered into by the defendant and HGVC Marketing does not bind the plaintiff, and therefore the plaintiff is not precluded from claiming the outstanding commissions due from the defendant. F

[12] Accordingly, I grant judgment for the plaintiff and order that the defendant pays to the plaintiff: G

- (a) the amount of RM2,209,555;
- (b) pre-judgment interest on such amount at a rate of 4%pa from 12 March 2003–27 August 2015 (as to the time from which interest is to run, see paras 54 and 55); H
- (c) post-judgment interest on the sum of the amounts referred to in sub-paras (a) and (b) above at a rate of 5%pa from 28 August 2015 until the date of full payment; and I
- (d) costs of RM30,000.

[13] The reasons for my decision are set out in the following paragraphs.

A ANALYSIS

Pleadings

B [14] Mr Gan Techeong, counsel for the defendant argued that the plaintiff's claim must necessarily fail, on the basis that the plaintiff's statement of claim had stated that the plaintiff had entered into the agency agreement with the defendant in or about February 1999. Based on the undisputed evidence received at trial, the plaintiff was only incorporated on 24 December 1999 and was therefore not even in existence in February 1999 to have been able to enter into the agency agreement.

D [15] The agency agreement was in fact signed by PW1, who at that time was carrying on business under a sole proprietorship registered as Pacific Fantasy Vacation. Although PW1 subsequently incorporated the plaintiff, the plaintiff and its shareholders are nonetheless separate legal entities. Mr Gan further argued that the parties must be bound by their respective pleadings, and because the existence of objective facts in respect of which evidence was received at trial show that the facts pleaded in the statement of claim could not possibly be true, the plaintiff's claim must therefore be dismissed by the court.

F [16] PW1, in her witness statement, readily admitted to the mistake in the statement of claim, and testified that the plaintiff had not yet been incorporated at the time she signed the agency agreement and therefore she had not done so as agent for the plaintiff.

G [17] Dato' Manokaran for the plaintiff argued that if the defendant had had any objection to the evidence of PW1 on this point, the defendant ought to have objected to her testimony at the time she was in the witness stand on grounds that it represented a departure from the pleadings. The defendant did not do this. Dato' Manokaran argued that the defendant was therefore estopped from raising the issue of pleadings at the submission stage.

H [18] The authority on this issue is the Supreme Court case of *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185. The relevant passages bear setting out in full:

I Generally, in civil cases only, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a court without such consent, please see *Baerlein v Chartered Mercantile Bank* [1895] 2 Ch 488; similarly with technical rules of procedure. *Therefore, when such evidence represents a departure from pleadings, it should be objected to as when and where it is adduced, and it will be too late when it only objected to later on, as in the final submission at the close of evidence in the*

instant appeal. In these circumstances, the party facing such evidence at variance from the pleadings, by failing to object, cannot be said to be taken by surprise, prejudiced, misled or embarrassed. Otherwise, the other side of the coin would be, in the event of such an objection raised at the stage of final submission being accepted by the court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleadings in question at that stage.

Such evidence, when given without any objection by the opposing party, will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading. As was stated by the Federal Court in *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 at p 278: 'Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise'. There is, however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.

The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v George Wimpey & Co Ltd* [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau & Anor v Lau Piang Ngong*, and *John G Stein & Co Ltd v O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.

Therefore, a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured. (Emphasis added.)

[19] In the present case, no objection was raised by the defendant when the plaintiff sought to introduce evidence that was at variance with its statement of claim. In my judgment, the evidence that was sought to be adduced did not constitute such a radical departure from the plaintiff's original claim as would justify dismissal of the plaintiff's action. The defect in the plaintiff's pleadings is therefore cured, on the basis that it could not be said that the defendant in this case was taken by surprise by the evidence of PW1 that the plaintiff was only incorporated after the execution by PW1 of the agency agreement, not least because the date of incorporation of any company would be a matter of public record.

[20] The case of *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 was cited to me in argument by counsel for the defendant. This case can however be distinguished on the basis that there, the trial judge had decided on a point that was neither pleaded nor argued in submissions, which in turn justified appellate intervention.

A *Issues for trial, O 34 of the Rules of Court 2012*

B [21] Mr Gan made the further argument that, with the introduction of the Rules of Court 2012, parties must now delimit the scope of their dispute in a list of issues for trial in the course of pre-trial case management conferences with the court. The gist of Mr Gan's argument was that O 34 r 2 of the Rules of Court 2012 operated to bind the parties to the specific issues delineated in the list of issues for trial.

C [22] The first issue in the list of issues for trial was set out as follows:

Whether the Defendant had on or about February 1999 entered into an agreement with the Plaintiff and had any contractual relationship with the Plaintiff from February 1999?

D [23] As the plaintiff was incorporated only in December 1999, counsel for the defendant submitted that this question must necessarily be answered in the negative and that accordingly this court should dismiss the plaintiff's claim.

E [24] The relevant provisions are O 34 rr 2(2) and 2(3) of the Rules of Court 2012, which state as follows:

F (2) At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including:

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(k) the filing of a statement of issues to be tried;

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H (3) The Court, having given directions under rule 2(2) or rule 3 may either on its own motion or upon the application of any party, if any party defaults in complying with any such directions, dismiss such action or proceedings or strike out the defence or counterclaim or enter judgment or make such order as it thinks fit.

I [25] In my view, there is nothing in plain words of O 34 that has the effect of binding the parties to the list of issues to be tried that has been filed into court. The advent of the list of issues for trial was not intended to supplant the rules of pleadings. Order 34 simply provides for the power of court to order or direct parties so that cases may be conducted in a just, expeditious and economical manner. Of course a failure of a party to comply with a court direction will entitle the court to enter judgment against the party in default, but this is not to say that a party may not raise in argument issues that have been

pleaded but have not been specifically set out in the list of issues to be tried, or that the common law rules on pleadings (including the principles discussed in *Hamit bin Matusin*) are taken to have been supplanted.

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[26] The Rules of Court 2012 are procedural code that are expressly stated to be subject to the overriding object of enabling the court to deal with cases justly. The rules of procedure are thus the tools by which justice may be arrived at by the courts. Technical objections ought not dictate where the justice of the case lies, unless a substantial miscarriage of justice or prejudice has been occasioned by the non-compliance with the rules of procedure.

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[27] The function of the list of issues to be tried is to frame the critical issues that drive the decision to be made by the court, to guide counsel on the evidence that they will need to adduce at trial, and — for judges — a useful rubric with which to analyse the merits of the case. To hold that the list of issues to be tried bind the parties regardless of what was pleaded would only create an incentive for parties to repeat all that was pleaded into the list of issues, with the attendant result of defeating the very purpose for its existence.

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Was the defendant bound by the terms of the agency agreement?

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[28] There was no evidence that the agency agreement was executed by the defendant. The agency agreement was executed by PW1, who was then carrying on business under a sole proprietorship registered as Pacific Fantasy Vacation.

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[29] The plaintiff company, Pacific Fantasy Vacation Sdn Bhd was only subsequently incorporated on 24 December 1999.

[30] There is nonetheless evidence to show that the defendant had regarded itself bound by the terms of the agency agreement. This evidence includes the following:

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- (a) the defendant provided materials that were necessary to market and sell the HGVC memberships to the public, such as copies of the prospectus and payment vouchers;
- (b) the defendant had set up offices within the premises operated by the plaintiff in order to facilitate the sale of the memberships. The subscription documentation were handed over to the defendant once completed;
- (c) the addresses of the plaintiff were listed in the prospectus as sales venues of the defendant;
- (d) crucially, on 11 September 2001, representatives of the plaintiff were

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A invited by the defendant to a meeting at the defendant's office, where the plaintiff was asked to sign a new agreement which would reduce the commission payable. PW1 was told by the representatives of the defendant that the agency agreement would be terminated by 30 September 2001 if the plaintiff failed to sign a new agreement.

B The point here is that the defendant would not have asked the plaintiff to sign a new agreement if it had not regarded the agency agreement as being binding on itself.

C [31] The existence of an agreement may be inferred from the language that the parties may have used in correspondence between them, the conduct of the parties with regard being had to the surrounding circumstances, and the object of the contract (per Edgar Joseph Jr SCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133).

D [32] The defendant's pleaded case (among others) was that the plaintiff's contractual claim ought to be against HGVC Marketing, and not the defendant. As mentioned, HGVC Marketing was a company owned and controlled by Chua Kim Hwa ('DW1'), who was also a director of the defendant at the material time. DW1 testified that HGVC Marketing was the sole and exclusive agent for the defendant as of 16 December 1999 pursuant to an assignment. However, no evidence was offered at trial as to the existence of any sub-agency agreement between HGVC Marketing and the plaintiff, nor of any notification to PW1 or the plaintiff of the assignment of the exclusive agency arrangement.

F [33] The evidence received at trial showed that, in connection with the commission payments:

- G (a) the commission payments were made directly into the bank account of either the plaintiff or PW1, depending on whether the commissions were paid prior to or after the incorporation of the plaintiff;
- H (b) in instances where the commissions related to sales effected in December 1999 or earlier, the commissions were paid through cheques drawn on the personal account of DW1, whereas commissions that related to sales effected in January 2000 and after were paid through cheques drawn on the account of HGVC Marketing;
- I (c) the plaintiff was notified by letter once payment of commissions have been made. These letters enclosed copies of the cheques and payment vouchers. These letters were sometimes on the letterhead of the defendant (eg B4/926A) and at other times were on the letterhead of HGVC Marketing.

[34] PW1 testified that she had thought that HGVC Marketing was a

subsidiary of the defendant, due to the fact that the plaintiff had continued to deal directly with the defendant on many matters relating to the sale of the memberships, and also due to the fact that DW1 was a director of both companies. In her testimony, she also drew the attention of the court to a memorandum from the defendant dated 25 June 2001 specifying its authorised personnel with whom the plaintiff may deal in connection with sales and commissions.

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[35] Having considered the evidence in this case as a whole, I find that there was in existence an agreement between the plaintiff and the defendant based on or based substantially on the terms of the agency agreement. Although payment may have been made from or out of accounts of DW1 and HGVC Marketing, the plaintiff was entitled to treat this as an internal arrangement of the defendant, and that as far as the plaintiff was concerned, it looked to the defendant to perform the obligation to make payment of commissions in connection with the sales of the memberships. There were numerous correspondence and memoranda tendered in evidence which showed that the plaintiff dealt directly with the defendant, including the 25 June 2001 memorandum. In my judgment, the fact that the defendant had tried in September 2001 to get the plaintiff to agree to new terms for the payment of reduced commission argues strongly for the case that the defendant had regarded itself bound by the terms of the agency agreement.

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[36] However, the existence of any agreement between the plaintiff and the defendant could not have preceded the incorporation of the plaintiff. The plaintiff may therefore only claim in respect of sales of memberships effected in 2000 and onwards. The proper claimant for the outstanding commissions payable in respect of sales effected in 1999 ought to have been PW1, as a sole proprietor carrying on business as Pacific Fantasy Vacation. Any such action would now however be time-barred.

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Termination of the agency agreement

[37] I find that the defendant had, by its conduct on 12 September 2001, repudiated the agency agreement. The removal of the sales documentation, credit card machines, computers, vouchers and receipt books was a clear indication that the defendant did not intend to carry on with its obligations under the agency agreement, and therefore amounted to a repudiation of the agency agreement. Under cl 10.3 of the agency agreement, the defendant may only terminate the agreement by six months' notice in writing to the plaintiff, in the absence of default by the plaintiff.

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[38] The law in relation to anticipatory breaches and repudiation is succinctly stated in the following passage of the judgment of Mohamed

A Azmi SCJ in the Supreme Court decision of *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291:

B It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract, but there must be an absolute refusal to perform his part of the contract (see *Freeth v Burr* 1874 LR 9 CP 208, at p 214). If there is an absolute refusal to perform, the other party may treat himself as discharged. *Short of an express refusal, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions.* Where such an inference cannot be drawn, the innocent party will be entitled to claim damages for breach, but not to treat himself as discharged. (Emphasis added.)

D [39] In the present instance, the actions of the defendant in removing the items on 12 September 2001 were such that a reasonable person would have concluded that the defendant no longer intended to be bound by the provisions of the agency agreement.

E [40] The plaintiff had pleaded that it regarded the agency agreement as having been terminated by reason of the repudiation by the defendant. The consequences of such termination was that the plaintiff was discharged from its obligations under the agency agreement. Such termination does not, however, affect rights and obligations that had accrued prior to termination. Of course, the obligations of the defendant to pay the commissions that are the subject of this claim remained executory at the time the agency agreement was terminated. However, the fact of termination does not discharge the defendant from its obligations. The defendant would still be liable for damages to the plaintiff, even though the obligation pay the commissions had not yet matured when the plaintiff elected to treat the contract as having been terminated on account of repudiation by the defendant: see *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL). The object of damages awarded would be to put the innocent party in the position as if the contract had been performed, and so the future obligations that had yet to mature at the time of termination should be taken into account when ascertaining damages.

H [41] The defendant had pleaded that the plaintiff had breached the terms of the agency agreement. However, at trial, no evidence was adduced to support such claim. Nor were any arguments proffered in submission by counsel for the defendant. Accordingly, I not only hold this contention unproven but also as having been abandoned.

I *The commission claimed*

[42] The plaintiff sought to claim outstanding commission in respect of sales of memberships effected prior to the termination of the agency agreement. It

will be necessary to briefly examine the methodology for the payment of commission under the agency agreement.

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[43] Memberships may be sold on an instalment basis. Under cl 5.1 of the agency agreement, the plaintiff as agent would be entitled to the full amount of commission payable once 60% of the purchase consideration for any particular membership has been received by the defendant. Under Schedule 2 of the agency agreement, the commission rate would vary between 25% to 30% of the price of a membership, depending on the gross revenue achieved by the agent. If the purchase consideration received by the defendant was less than 60%, then the agent would only be entitled to be paid a pro-rated share of the full commission payable, until such time as the purchase consideration has been paid up to 60% (cl 5.5).

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[44] Based on the evidence at trial, once the completed membership forms were received from purchasers, those forms were handed over to a representative of the defendant located at the office premises of the plaintiff. In the following month, the plaintiff would be given a statement of account together with a payment voucher showing the commissions payable, and deposit slips showing that the commission had been deposited into the bank account of the plaintiff. As such, the plaintiff would be dependent on the defendant to inform it on the payment status of each membership sale.

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[45] It is important to note that the commission payments accrued over time and were payable progressively as and when the instalment payments of the purchase consideration were received by the defendant. The amount of commission payable each month in respect of a particular membership sale would depend on the tenure of the instalment plan. No evidence was tendered at trial on the tenure of the memberships in respect of which outstanding commissions were being claimed by the plaintiff, but:

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- (a) it cannot be disputed that all the outstanding commissions would have become due and payable by the time the plaintiff commenced this action. Based on the evidence received at trial, the instalment tenure would vary between two to five years (p 10 of the notes of evidence for 21 May 2015). Accordingly, if a five-year instalment sale was concluded in September 2001, immediately before the repudiation by the defendant, the instalment payments would have had to continue to be made until August 2006. However, all the commission in respect of this sale would have been payable once 60% of the purchase price was received, which would have been in August 2004; and
- (b) it was not disputed that all relevant information regarding the memberships was in the possession and control of the defendant (see for example, p 82 of the notes of evidence for 18 May 2015).

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A [46] It was also not disputed that all the commissions that were due and payable prior to the termination of the agency agreement had in fact been paid to the plaintiff. As such, the plaintiff's claim in this action was limited to commissions that became due and payable *after* the repudiation by the defendant (on 12 September 2001), in respect of sales of memberships that had been effected *prior* to such repudiation. This is an important consideration in determining when the cause of action arose. See para 56.

C [47] The total amount of outstanding commission claimed by the plaintiff was RM2,389,164.42, as set out in the annexure to the statement of claim. PW2 in his witness statement explained how this figure was derived from the membership sales. (PW2 is PW1's husband, who was also a shareholder of the plaintiff and who oversaw accounting matters pertaining to the plaintiff.)

D [48] A potential issue that arises in respect of the amount claimed is that the computation of the commission by PW2 had assumed that the instalment payments would continue to be made until at least 60% of the purchase price had been paid. Of course, there is no assurance that this would indeed be the case in all instances. PW2 himself acknowledged that a member may pass away or have an accident and therefore cease to service the instalment payments.

F [49] As mentioned above, the information relating to the status of payment for each membership was within the knowledge and control of the defendant. At trial, Mr Gan, counsel for the defendant, had sought to introduce new documents during the defendant's case relating to members who had paid less than 60% of the purchase price. Dato' Manokaran for the plaintiff objected, on the basis that such information did not go towards the defendant's pleaded case, which was simply that it was not bound by any contract to pay commissions to the plaintiff. Faced with a choice between amending its defence (and potentially bearing the consequences of any delay) and proceeding with its pleaded case, the defendant elected for the latter course. I then ruled the documents sought to be introduced inadmissible on the basis that they did not go towards the defendant's pleaded case.

H [50] Mr Gan's plaintive rejoinder in the course of submissions was to state that sauce for the goose ought to also be sauce for the gander, and that it would be unfair to permit the plaintiff's claim on the basis of evidence that was at variance with its pleaded case, and yet hold the defendant to the four corners of its defence. The answer to this is simply that counsel for the plaintiff had objected when the evidence was sought to be introduced, whereas he did not.

I [51] It has also to be borne in mind that the defendant had ample opportunity to consider its defence and to tender documents that it thought necessary for the purposes of answering the claim of the plaintiff, given that this

case commenced in 2005. Counsel appeared in four pre-trial case management conferences before me, and directions were given for the trial bundles to be filed by 30 April 2015.

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[52] Pursuant to s 106 of the Evidence Act 1950, where a fact is especially within the knowledge of a party, that party bears the burden to prove that fact. The defendant did not tender evidence to show the actual rate of default or termination in respect of the memberships that are the subject matter of the claim. In the present circumstances, I find that the plaintiff has proven its claim, which, based on the testimony of PW2, was derived from the actual membership sales.

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[53] However, as I have determined that the plaintiff ought not be entitled to claim commissions in respect of sales effected in the year 1999, the amount of commissions to which the plaintiff is entitled is RM2,209,555 (ie the amount claimed less the sum of RM179,609.42 claimed in respect of sales for 1999).

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Interest

[54] The plaintiff claimed for interest. The award of pre-judgment interest is subject to the discretion of the court, in accordance with s 11 of the Civil Law Act 1956. In determining the time from which interest should run, I noted the following:

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- (a) there was no evidence before this court on the instalment tenure for the purchase of each of the memberships in respect of which the commissions were claimed, save that the instalment term would range between two to five years;
- (b) accordingly, while it will not be possible to ascertain exactly when each and every commission payment became due and payable, it is clear that all the commissions claimed would have become due after the expiry of three years following termination (on the basis of the logic described in para 45(a)); and
- (c) of course, some of those commissions would have become due earlier, within such period of three years.

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[55] Taking into consideration these points, I consider it appropriate to order interest to run from the expiry of 18 months from the termination of the agency agreement, ie from 12 March 2003.

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A *Limitation and laches*

[56] The issue of limitation does not arise. The plaintiff's cause of action arose when the defendant repudiated the agency agreement and failed to pay the commissions when they became due and payable, beginning from September 2001. This action was commenced on 25 July 2005, which meant that the plaintiff was not out of time. As mentioned earlier, the subject matter of the claim does not relate to any commission payable prior to the repudiation by the defendant, which the plaintiff acknowledged had been duly paid by the defendant in accordance with the terms of the agency agreement.

[57] The defendant further pleaded that the plaintiff ought to be precluded from succeeding in its claim due to the operation of the doctrine of laches.

[58] For laches to apply, the plaintiff must have been guilty of unconscionable delay in prosecuting its claim. In the present case, there was no cogent evidence tendered by the defendant to show that the plaintiff was guilty of indolence as would justify the intervention of the principles of equity.

E *The settlement between the defendant and HGVC Marketing and/or Chua Kim Hwa*

[59] There had also existed a dispute between HGVC Marketing and DW1 on the one hand, and the defendant and Woo Brothers Development Sdn Bhd (the shareholder of the defendant) on the other. A settlement was recorded between them by way of a consent judgment on 1 September 2009.

[60] The defendant had pleaded that it had settled all outstanding claims for commission from HGVC Marketing and therefore the plaintiff's recourse ought to be against HGVC Marketing. In other words, the contention by the defendant was that the terms of the consent judgment ought to operate to prevent the plaintiff from making any claim against the defendant.

[61] This allegation, which though pleaded was not raised in argument by Mr Gan, overlooks the basic principle that a consent judgment operates as an agreement between the parties to the action. Accordingly, a consent judgment can never bind non-parties. As the plaintiff was not a party to the consent judgment, the plaintiff is not bound by it.

[62] For the reasons set out above, I allow the plaintiff's claim on the terms set out in para 12.

Claim allowed.

Reported by Dzulqarnain Ab Fatar

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